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In the Supreme Court of the United States

OCTOBER TERM, 1957

VERNON F. NEISWAGEN, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
[illegible],
Assistant Attorney General,
BEATRICE ROSENBERG,
ALBERT E. [illegible],
Attorneys,
Department of Justice,
Washington 25, D. C.

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No. 797

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 13-19) is reported at 250 F. 2d 838.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1958 (Pet. App. 20). The petition for a writ of certiorari was filed on February 19, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court improperly limited petitioner's testimony.

2. Whether the trial court erred in excluding secondary evidence of a matter sought to be introduced when the best means of proving the alleged fact was available.

3. Whether the Court of Appeals erroneously applied the legal test for determining the sufficiency of evidence when considering alleged errors relating to the admissibility of evidence.

STATEMENT

On March 2, 1956, petitioner was convicted, in the United States District Court for the Eastern District of Missouri, under counts 1 and 3 of an indictment charging two violations of the mail fraud statute, 18 U.S.C. 1341 (R. 18). He was sentenced to two years imprisonment for each offense, the sentences to run concurrently (R. 19-A, 28).

1. Each count charged petitioner, as president of the Jefferson Loan Company, and one Marion F. Langenberg, a certified public accountant, with mailing false and fraudulent statements to a particular creditor bank of petitioner's Company in furtherance of a scheme designed to lead the banks to extend credit in the belief that the Company was solvent when in fact it was not (R. 1-5).[1] Evidence introduced at the trial showed the facts to be the following: Petitioner was actively in charge of the business of the Jefferson Loan Company, which lent money, bought accounts receivable at discount and borrowed money from banks

[1] The trial court set aside the verdict of guilty as to the certified public accountant on the ground that the evidence was insufficient to find him guilty of participation in the scheme to defraud (R. 29-30).

to finance its operations (Tr. 97-98, 111-112).[2] The financial statement in question which was furnished to the banks was false and misleading in that it grossly overstated the assets of the company, and included as assets loans made to nine accounts which were worthless and uncollectible and which long since should have been charged off its books as bad debts (Tr. 432-448). This financial statement was prepared from accounts kept under the direction of petitioner (Tr. 97-98, 103-106),) who had been in the finance business for a number of years. (Tr. 505).

There was evidence that petitioner, at the time the financial statement was prepared, was fully conversant with the status of these accounts. He gave directions to and had full reports from his subordinates who had been assigned to try to salvage something from them at times long prior to the issuance of the statement (Tr. 179-182, 189, 192-199, 203-209, 237-240, 327). The employee who made up the delinquency sheet reported directly to petitioner (Tr. 342). The evidence indicates that petitioner knew that some of his "current" receivables involved bankrupt concerns (Tr. 142-143, 162-163) and spurious invoices (Tr. 328-331, 436).

The record also shows that, after the company had been forced into receivership (Tr. 25-26, 37, 160), petitioner, in connection with a petition to the Tax Court, stated that as a result of an examination by over 10 creditor banks to which the Company was in debt for approximately $1,000,000.00, "it appears and petitioner so avers that it has erroneously failed to charge off worthless and uncollectable loans and discount receivables in the amount of about $959,000.00 as bad

[2] Volume II of the record before this Court, the transcript of trial proceedings, is separately paginated and will be referred to as "Tr.".

debts, losses and expenses in computing petitioner's taxable net income for the fiscal years here in question" (Tr. 287-289; Ex. 89).

The actual worthlessness of the nine "current receivable" accounts was further shown by evidence that they represented repeated renewals of accounts on which the interest had not been paid (Tr. 432-448). The practice of the company was to add the interest to the loan and extend it as a current account (Tr. 142-143, 159-162). When the receiver attempted to liquidate the accounts in question, he collected virtually nothing on them (Tr. 38-45, 433-443).

2. In connection with the practice of adding on interest in renewing loans, petitioner undertook to testify that the various banks which dealt with his company renewed their loans and added interest to the principal in the same manner as his company did (Tr. 512-517). Over objection that the books of the banks were the best evidence, he was permitted to testify, on his own knowledge, that this was the practice of the New York bank involved in count 3 (Tr. 511-512). Petitioner also testified that this was often the practice of the Stock Yards Bank involved in count 2 (not submitted to the jury) but an objection to his answer was sustained, the court stating that the books were the best evidence (Tr. 512-513). Petitioner's attorney then attempted to show, from a ledger sheet of the Mutual Bank involved in count 1, that that bank followed this practice, but the records did not so indicate and petitioner could recall "no case where it was done by the Mutual Bank" (Tr. 514-517).

3. Petitioner's defense at the trial was that in furnishing the financial statement to the banks he acted in good faith and in reliance upon his accountants. He

also testified that he felt that every loan "when it was made was a good loan" (Tr. 581). When the Tax Court petition was made, he protested to a lawyer "that those loans weren't bad debts and that I still considered them collectable" (Tr. 582). He then attempted the following explanation of why more loans by his Company were not charged off as bad debts prior to the financial statement (Tr. 585-587):

Q. Sir, I want to ask you with respect to the loans, can you tell his Honor and this jury why more loans had not been charged off as bad debts on July 31, 1951?

A. Well, at that very time, in fact, I guess the entire year of 1951, the federal government Internal Revenue Department had filed an assessment against the Jefferson Loan asking for more taxes, stating that we were setting up too high a reserve for bad debts, our reserves were too high.

Mr. BOECKER: I will submit the answer is not responsive.

The COURT: Objection sustained. He is talking about not setting up a bad reserve.

Q. Can you tell me then, did the examination of the government have anything to do with the fact that you hadn't charged off more bad debts?

Mr. BOECKER: I will object on the part of the government; it is a conclusion on the part of the witness and involves opinions as to what the government showed.

The COURT: Sustained.

Mr. HENNELLY: I offered that to show the state of mind at the time.

Q. Did you feel at the time they were bad debts?

A. Well, there is different definitions of bad debts. According to my definition, which is commonly accepted in the finance industry, I did not consider them bad debts.

Mr. HENNELLY: May I make an offer of proof on that?

The COURT: Yes, but don't make it broader than the question.

(OUT OF THE HEARING OF THE JURY:)

Mr. HENNELLY: I want to prove by this witness that the reason he did not charge off more loans as bad debts was for the reason that the income tax people had been investigating his books and that they had levied an investigation for his using too high a reserve for bad debts and he felt if he charged off more bad debts he would get into additional trouble with the Internal Revenue Department.

The COURT: You understand when you go into a question of that kind, as I understand the law, the government requires you to charge a bad debt off in the year it becomes bad. You can't wait until one year and charge off bad debts for many bad debts in previous years that had been prior thereto that have become bad. A bad debt must be charged off in a specific year. Your question goes to why he didn't charge them all at one time. He may have been claiming to the government—the government may have admitted they were bad debts, but trying to charge them off, your offer will be reputed for that reason.

ARGUMENT

1. Petitioner contends that he was erroneously denied the opportunity to testify that the reason the financial statement did not show greater charge-offs of loans was because the Internal Revenue Service told the Company it was setting up too high a reserve for bad debts (Pet. 8-10). The colloquy quoted in the Statement shows however that the ruling of the trial court was fully justified. Petitioner's offer of proof did not relate the statement by the Service to the loans under consideration. To develop the proof petitioner had in mind would have necessitated going into a consideration of whether the alleged objection depended upon the particular year in which a particular deduction was claimed and would have involved a complicated collateral line of proof which had no real relevancy. See *Randle* v. *United States*, 113 F. 2d 945, 951 (C.A. D.C.), certiorari denied, 311 U.S. 683.

As stated by the Court of Appeals (Pet. App. 18):

> * * * What the agents of the Internal Revenue Department may have thought about the Company's reserve for bad debts, could not justify or excuse including bad debts, known to be bad, as current assets in the financial statement furnished the banks.

Whether or not petitioner was motivated by fear of the Internal Revenue Service—a highly speculative theory at best—he nevertheless knowingly and intentionally intended to defraud the banks in submitting the false statement if he knew that accounts submitted as current assets were worthless. And, as appears from the Statement, the evidence justified the jury finding

that petitioner did, in fact, know they were worthless.[3]

Moreover, just prior to and at the same time that petitioner was seeking to introduce this testimony, which implied that he thought the loans were bad but that he did not charge them off because he was afraid of getting into trouble with the tax authorities, he was testifying that he did not charge them off because he did not consider them bad debts (Tr. 581-582, 585-587; *supra*, pp. 4-6). The latter declaration of bona fide intent was accepted by the court as petitioner's defense and the court properly refused, in the exercise of its discretion, to allow the record to be burdened with confusing and self-contradictory statements. *Schindler* v. *United States*, 208 F. 2d 289 (C.A. 9), certiorari denied, 347 U.S. 938; *Johnson* v. *United States*, 170 Fed. 581 (C.A. 1); cf. *United States* v. *Grayson*, 166 F. 2d 863, 867 (C.A. 2).[4]

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[3] Petitioner's assertion that the Court of Appeals usurped the function of the jury by determining what petitioner's intent was, thereby determining his guilt, is unfounded (Pet. 9-10). The Court of Appeals merely held that the evidence sought to be introduced was properly excluded because it did not meet the tests of admissibility. The cases cited by petitioner for the proposition that an accused may testify as to his intent, that inconsistent evidence of intent is a jury issue, and that inconsistent defenses may be employed in a criminal case (Pet. 9-10) presuppose the materiality and competency of the evidence sought to be introduced. *United States* v. *Bookie*, 229 F. 2d 130 (C.A. 7). Since the courts below found the proposed evidence incompetent as a matter of law under rules governing the admission of evidence, petitioner's cases are not in point.

[4] Petitioner's present assertion that "it was more plausible to interpret the proffer to mean that one of the reasons that petitioner thought the loans collectible and properly in the company's current assets was that they could not be charged off as bad debts" (Pet. 8) is untenable. There is no basis for concluding that petitioner considered the loans good debts because the Internal Revenue Service told him the Company reserve for bad debts was too high. The

2. Petitioner avers that the courts below erred in refusing to admit his testimony that some of the creditor banks allegedly renewed their loans to his Company by adding past due interest to the principal just as his Company renewed their loans to others. He claims that this evidence was material to show that the practice was an acceptable one of which the creditor banks were cognizant and therefore not indicative of a means by which his Company concealed from the banks its true financial condition (Pet. 10-11).

Petitioner was not prevented from introducing this evidence. He was permitted to testify that this was the practice of the New York bank involved in count 3 and he could not recall any case in which the practice was followed by the Mutual Bank involved in count 1. These were the only counts submitted to the jury. As to the practice of banks involved in counts 2 (Stock Yards Bank) and 4 (Manchester Bank), not submitted to the jury, the trial court would have allowed him to introduce the evidence if he could have done so by the best evidence available. The books of the bank were in court but petitioner attempted to testify on his own knowledge. The court sustained the objection to that line of testimony on the ground that the books of the bank were the best evidence, but petitioner either would or could not use the books to get the evidence in.

To the extent that the court did permit the testimony its ruling was more favorable to petitioner than was required. The testimony was irrelevant to the issues

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evidence indicates and the jury found that petitioner knew that the bad accounts reported as current assets were worthless. That the alleged warning by the Service could change his mind, or even enable him to use it as a basis for an opinion if he had no previous opinion, is incomprehensible.

in the case. Officials of the National Stock Yards Bank and the Manchester Bank testified that, after petitioner had assigned the assets of his Company to a trustee for the benefit of the creditor banks, they went over some Company books and discovered that the Company extended delinquent accounts by adding past due interest to the principal and carrying them as current assets. Some of these accounts related to bankrupt concerns and some of the cards noting extensions of credit were initialed by petitioner (Tr. 142-143, 162; *supra*, p. 3). The significance of this testimony was that the Company carried some large delinquent accounts as current assets, not that petitioner's Company perpetrated a fraud on its creditors by adding comparatively small amounts of uncollectible interest to the principal of a loan.

3. Petitioner's assertion that the Court of Appeals "in reviewing the errors urged, relating to the admission and exclusion of evidence and a motion for a mistrial, adopted an erroneous standard" is without merit. He contends that the court applied the rule for testing the sufficiency of the evidence, by giving the government the benefit of every reasonable inference which can be drawn from the evidence, when considering alleged errors relating to the admission and exclusion of evidence (Pet. 11).

The opinion of the Court of Appeals itself negates this assertion. Petitioner quotes part of the opinion out of context (Pet. 11). The entire relevant quotation is (Pet. App. 14-15a):

> The alleged errors of the District Court upon which the defendant Neubauer relies for reversal

relate to rulings on evidence, the denial of a motion for a mistrial, and the denial of a motion for a directed verdict of acquittal.

In considering these alleged errors, it is necessary to keep in mind that the burden of demonstrating both error and prejudice is upon the defendant (*Hunt* v. *United States,* 8 Cir., 231 F. 2d 784, 788; *Palmer* v. *Hoffman,* 318 U.S. 109, 116), and that this Court must give to the Government the benefit of every reasonable inference which can be drawn from the evidence viewed in the aspect most favorable to the Government. [Cases.]

In alleging below that the trial court erred in denying his motion for a directed verdict, petitioner attacked the sufficiency of the evidence. It is evident from the opinion that the Court of Appeals was alluding to this question in referring to the test under consideration. The Court of Appeals determined the questions relating to the admissibility of evidence separately and under other criteria.[5]

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[5] Although petitioner does not argue the point at length, he suggests that he was prejudiced (Pet. 4-5, 11) by the refusal of the trial court to let him cross-examine an official of the Manchester Bank as to whether the bank official had told petitioner he was not interested in collecting the loans to the Company (Tr. 147-149). Petitioner also made an unsuccessful attempt to testify as to this alleged fact himself (Tr. 559-563). Similarly, petitioner complains because he was not allowed to cross-examine an official of the National Stock Yards Bank as to whether payment was not demanded on their loans to the Company because the bank planned to deduct the loans as bad debts for tax purposes (Tr. 174-175). As the Court of Appeals said in disposing of these contentions below (Pet. App. 18):

"We find no merit in any of these contentions. The crucial issue in the case was whether or not Neubauer, in mailing the false financial statement in suit to the creditor banks, did so with fraudulent intent, not whether * * * they expected the Company to

We submit that the decision below is correct in every respect. The issues raised relate only to the particular case and are not matters of general applicability. There is no conflict of decision and no question warranting review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys.

MARCH 1958.

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repay its loans, or what they expected to do for tax purposes if their loans were uncollectible."

Even if the proffered evidence went so far as to show that the banks were not taken in by petitioner's pretenses, it is the law that the fraudulent scheme need not be successful in order for the perpetrator to be guilty under the mail fraud statute. *United States* v. *Sylvanus*, 192 F. 2d 96 (C.A. 7), certiorari denied, 342 U.S. 943; *Busch* v. *United States*, 52 F. 2d 79 (C.A. 8), certiorari denied *sub nom. Grieble* v. *United States*, 284 U.S. 687.

Moreover, petitioner was not convicted under the counts of the indictment which charged the mailing of the fraudulent financial statement to the Manchester and Stock Yards Banks. The court had withdrawn these counts from the consideration of the jury. Petitioner, therefore, should not be heard to complain of the exclusion of evidence relating to counts under which he was never convicted.

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